

In: KSC-BC-2020-05
The Prosecutor v. Salih Mustafa

Before: **Trial Panel I**
Judge Mappie Veldt-Foglia, Presiding Judge
Judge Roland Dekkers
Judge Gilbert Bitti, Judge Rapporteur
Judge Vladimir Mikula, Reserve Judge

Registrar: Dr Fidelma Donlon

Filed by: Dr Anni Pues, Victims' Counsel

Date: 24 January 2022

Language: English

Classification: **Public**

**Public Redacted Version of Victims' Counsel request pursuant to the Second
decision on the conduct of the proceedings dated 21 January 2022**

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I. INTRODUCTION

1. In its oral order from 13 December 2021 Trial Panel instructed the Victims' Counsel to submit her request regarding the next procedural steps sufficiently in advance of the end of the Prosecutor's case. In particular it instructed the Victims' Counsel to file a request laid out in paragraphs 34, 35 and 37 of the Decision on Victims' Procedural Rights during the Trial from 12 July 2021, subject to the issuance of the Panel's decision on the issue of reparations.
2. In the above-mentioned decision, the Trial Panel issued guidelines regulating the participation of victims in the proceedings. The Trial Panel decided on, amongst others, the presentation of evidence by Victims' Counsel if ordered by the Panel.¹ In particular the Trial Panel instructed the Victims' Counsel to indicate whether she wishes the Panel to order the submission on non-oral evidence relating to the victims' personal interests and rights.² Furthermore, the Trial Panel allowed Victims' Counsel to request to authorise victims participating in this case to directly address the Panel not as witnesses but in order to present their views and concerns.
3. In its decision dated 21 January 2022, the Panel ordered the Victims' Counsel to file, by 11 February 2022: (i) a list of proposed (expert) witnesses to be called by the Panel and relevant non-oral material she wishes the Panel to order the submission of related to the establishment of the truth, if any, including the information set out in paragraphs 34-35 of the Decision on Victims' Procedural Rights of 12 July 2021; and

¹ KSC-BC-2020-05, F00152, Trial Panel I, Decision on victims' procedural rights during trial, 12 July 2021, paras. 29-38.

² Idem para 35.

(ii) a request, if any, seeking the Panel's authorisation for victims she represents to present their views and concerns before the Panel.³

4. In this submission Victims' Counsel requests the Panel to appoint an expert on medical forensic evidence for the purpose of individual reparations and truth-finding. Additionally, Victims' Counsel requests the Panel to authorise one participating victim, Victim 05/05, to directly address the Panel in order to present their views and concerns.

II. APPLICABLE LAW

5. According to Article 22 (7) of the Law, the Panel may, either upon request or on its own motion in exceptional circumstances, include a decision on the scope and extent of any damage, loss and injury to, or in respect of, victims. Article 22 (8) of the Law allows the Panel to make a reparation order directly against the accused to or in respect of victims, collectively or individually. Pursuant to Article 22 (9) of the Law the Panel may, where appropriate, refer the victims to civil litigation in the other courts of Kosovo.

6. Rule 114 (5) of the Rules of Procedure and Evidence ("Rules") provides that if evidence was not produced by the Parties or the produced evidence does not adequately address the impact the alleged crimes have on the personal interests of victims, Victims' Counsel may request the Panel to order the submission of relevant evidence or call witnesses to testify.

7. Besides this the Panel itself may also invite the submission of or *proprio motu* call additional evidence not produced by the Parties, including expert evidence, where it

³ KSC-BC-2020-05, F00296, Trial Panel I, Second decision on the conduct of the proceedings, 21 January 2022, para. 13 and 21.

considers it necessary for the determination of the truth. This is enshrined in Rule 132 of the Rules.⁴

8. Rule 168 of the Rules provides that where the Panel makes an order pursuant to Article 22 (8) of the Law against the convicted person, it may appoint experts to assist it in determining the scope of any damage to, or in respect of victims and to suggest options concerning appropriate individual or collective reparations from the convicted person. The Panel may do so upon request by Victims' Counsel, or the Panel may invite Victims' Counsel and the convicted person to make observations on expert reports.

III. PROCEDURAL BACKGROUND

9. In her opening statement, Victims' Counsel stressed that it is vital, in light of the victims' rights and personal interests, that the Panel awards individual reparation to the Participating victims under article 22 (8) of the Law. In her Written Submission on Reparations dated 18 October 2021 she reiterated this point.⁵ Alternatively, Victims' Counsel has requested that the Panel as a minimum decides on the scope and extent of the damage, loss and injury suffered by the individual participating Victims pursuant to Article 22 (7) of the Law.⁶

10. The Panel has appointed experts to assess whether the other courts in Kosovo offer a realistic avenue for the victims of the alleged crimes to claim reparations, and if

⁴ In this regard, Victims' Counsel notes para. 81 of the UN Istanbul Protocol, which explicitly states that "alleged victims of torture or ill-treatment and their legal representatives must be informed of, and have access to, any hearing as well as to all information relevant to the investigation and must be entitled to present other evidence."

⁵ KSC-BC-2020-05, F00239, Victim's Counsel Submission on Reparations, 18 October 2021.

⁶ *Idem*.

reparation judgments issued by such other courts can be enforced.⁷ Victims' Counsel opposed the referral of reparations proceedings to other courts in Kosovo in previous submissions.⁸ In a separate filing, Victims' Counsel will provide additional observations on the expert reports filed on 17 December 2021.⁹

11. The Victims represented by Victims' Counsel have already made oral witness statements on their experiences and harm suffered as result of the crimes allegedly committed by the Accused.

IV. REQUEST FOR THE APPOINTMENT OF AN EXPERT ON MEDICAL FORENSIC EVIDENCE

Introduction

12. Victims' Counsel requests the Panel to order non-oral evidence relating to victims' personal interests and rights. Specifically, she requests the Panel to appoint an expert on medical forensic evidence with regard to the three direct victims participating in the proceedings. The purpose of a medical forensic assessment is to present medical findings that correlate with the direct victims' testimonies and other evidence of experiences of abuse.

13. Victims' Counsel is aware of the fact that there is no certainty yet whether the Panel will decide itself on reparations. Nevertheless, Victims' Counsel points out that

⁷ KSC-BC-2020-05, F00184, Public redacted version of Third decision on the appointment of expert(s), 3 September 2021.

⁸ KSC-BC-2020-05, F00134, Victims' Counsel Submission on the Decision on the appointment of expert(s), 14 June 2021.

⁹ KSC-BC-2020-05, F00287, Transmission of Expert Reports with four confidential and two public Annexes, 17 December 2021.

evidence which is admitted in the current proceedings can also serve to determine the scope and extent of the damage, loss and injury suffered by the individual Victims pursuant to Article 22 (7) of the Law. Furthermore, and importantly, such evidence also leads to the establishment of the truth, that is, the nature of the crimes on the victims.

14. This request pertains only to the direct victims: Victims 08/05,¹⁰ Victim 09/05,¹¹ Victim 10/05.¹² With regard to [REDACTED],¹³ a medical forensic assessment will not be as beneficial. Their harm is in many ways [REDACTED]. If the Accused is convicted [REDACTED].¹⁴ In her decision to limit the request for the appointment of a medical expert, Victims Counsel also takes into consideration costs and time involved in an expert assessment, aiming to prevent as much as possible delay in the proceedings. Also, Victims' Counsel considers that with regard to [REDACTED] the burden that would result from further individual harm assessment would not be proportionate to the benefits to be expected from it.

The need for medical assessments

15. Reparations are only granted in international criminal proceedings if there is evidence that demonstrates that the victims suffered damage as a result of the accused crimes. In the *Lubanga* case the Appeals Chamber of the ICC, while noting that for reparations a less exacting standard than for trial applied, observed:

¹⁰ Victim 08/05 testified under the pseudonym [REDACTED].

¹¹ Victim 09/05 testified under the pseudonym [REDACTED].

¹² Victim 10/05 testified under the pseudonym [REDACTED].

¹³ Victim 05/05 [REDACTED]; Victim 06/05 (testified under the pseudonym [REDACTED]); Victim 12/05 (testified under the pseudonym [REDACTED]); Victim 13/05 (testified under the pseudonym [REDACTED]).

¹⁴ [REDACTED].

“In the reparation proceedings, the applicant shall provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case.”¹⁵

16. The ICC Appeals Chamber went on to note:

“In determining the appropriate standard of proof in reparation proceedings, various factors specific to the case should be considered, including the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence.”¹⁶

17. The practice of (international) criminal courts confirms the importance of medical assessments to demonstrate the harm suffered by victims. The ICC heavily relied on evidence provided by medical and psychological experts in assessing the harm and in deciding on the types, modalities and scope of reparations.¹⁷ The Inter-American Court of Human Rights has weighed the medical evidence of torture and cruel,

¹⁵ *Prosecutor v. Lubanga Dyilo*, Appeals Chamber, Annex A to ‘Judgement on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” 3 March 2015 <available at: https://www.icc-cpi.int/RelatedRecords/CR2015_02633.PDF>, para. 11.

¹⁶ *Prosecutor v. Lubanga Dyilo*, Appeals Chamber, Annex A to ‘Judgement on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” 3 March 2015 <available at: https://www.icc-cpi.int/RelatedRecords/CR2015_02633.PDF>, para. 11. In this regard, the Trial Chamber I noted that it is possible to infer from the practice of human rights bodies that a flexible approach to the standard and burden of proof in reparations claims applies (*Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, ‘Observations on issues concerning reparations submitted by the Office of Public Counsel for Victims’ 18 April 2012, ICC-01-04/01-06, paras. 38-39, 41-42). The IACHR has used presumptions in relation to establishing certain facts (*Castillo-Petruzzi et al.*, 30 May 1999, par. 62; *Loayza-Tamayo*, Reparations, Judgment of 27 November 1998, Series C No. 42 (1998), par. 51; *Paniagua Morales et al. v. Guatemala* (the White Van case), Merits, 8 March 1998, par. 72; *Blake v. Guatemala*, Merits, 24 January 1998, par. 49; and *Gangaram- Panday v. Suriname*, Merits, Reparations and Costs, Judgment of 21 January 1994, Series C No. 16, par. 49).

¹⁷ See. e.g. *Prosecutor v. Boco Ntaganda*, Reparations Order, 8 March 2021, ICC-01-04-02/06; *Prosecutor v. Boco Ntaganda*, Judgment, 8 July 2019, ICC-01/04-02/06.

inhuman and degrading treatment it had available. Medical reports showing physical signs of ill-treatment contributed to the Court's findings on the victims' sufferings.¹⁸

18. The accused has allegedly committed crimes of torture and cruel treatment and arbitrary detention. The importance of forensic medical evidence in legal proceedings involving crimes of torture and other ill-treatment is internationally recognised. The significance of such evidence for the specific purpose of reparations is also well-established. The UN Istanbul Protocol explicitly states that the

“broad purpose of the investigation is to establish the facts relating to alleged incidents of torture, with a view to identifying those responsible for the incidents and facilitating their prosecution, or for use in the context of other procedures designed to obtain redress for victims.”¹⁹

19. In the present proceedings, the purpose of a medical forensic assessment is to present medical findings that correlate with the direct victims' allegations of experience of abuse. Currently, the Trial Panel has been presented with oral evidence on the damages and injuries suffered by the direct victims as a result of the accused crimes. Victim 10/05 [REDACTED] testified that the torture he went through during his illegal detention resulted in different psychological and physical injuries and left him, amongst others, [REDACTED]²⁰ as well as [REDACTED].²¹ Victim 09/05 [REDACTED] also described, during his testimony, a wide range of psychological and physical harms he suffered during his illegal detention and from which he still suffers

¹⁸ See e.g. *Paniagua Morales v. Guatemala*, IACHR 8 March 1998, (Ser. C) No. 37, para. 89(a).

¹⁹ UN Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), 9 August 199, para. 77.

²⁰ Transcript, 21 September 2021, p. 523, lines 12-13 and 18, p. 524, lines 6-7 and 12-16 and p. 538, lines 14-22.

²¹ Transcript, 21 September 2021, p. 523, lines 12-17, p. 524, lines 17-24 and p. 540, lines 16-21.

today, including [REDACTED]²² [REDACTED]²³ and [REDACTED].²⁴ Finally, Victim 08/05 [REDACTED] testified that he becomes nervous, feels tired and out of energy because of what he experienced in Zllash.²⁵ These events have also impacted his family life as [REDACTED].²⁶

20. These victims' testimony are necessary components in the documentation of torture and corroborate each other. However, the requested medical assessments will be helpful in further understanding the great extent of harm that the victims have suffered and the damage done. In this vain, it will further corroborate the victims' testimony.

21. Both physical and psychological evaluations are important to establish the facts. As for physical evidence of torture, they provide important confirmatory evidence that a person was tortured.²⁷ Psychological evaluation constitutes critical evidence of abuse, as torture and other ill-treatment often cause devastating psychological harm. The victims have provided some descriptions that would indicate such psychological harm. In these proceedings, physical and psychological assessments can provide evidence of specific harmful events additional to the personal accounts and recollections of the victims.

22. In this regard Victims' Counsel also points out that the direct Victims have difficulty to present other direct documentary or tangible evidence on every aspect of the harm suffered by them. The alleged crimes took place in historical situations

²² Transcript of 4 October 2021, p. 929, lines 14-19; Transcript of 5 October 2021, p. 948, lines 5-10.

²³ Transcript of 4 October 2021, p. 929, lines 14-19; Transcript of 5 October 2021, p. 943, lines 4-7 and 14-19 and p. 944, lines 11-15.

²⁴ Transcript of 5 October 2021, p. 960, lines 8-9.

²⁵ Transcript of 11 November 2021, p. 1507, lines 6-13.

²⁶ Transcript of 11 November 2021, p. 1509, lines 19-23.

²⁷ UN Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), 9 August 199, para. 161.

characterised by conflict and widespread atrocities. Even after the war ended, victims have described that they [REDACTED].²⁸ The societal conditions in Kosovo as well as post-traumatic shame may be contributors to that, as a traumatised person can often feel intense feelings of fear and shame that trigger isolation and distrust.²⁹ It is for these reasons difficult for victims to obtain documentary evidence. Moreover, understanding the full impact of psychological harm done and the trauma suffered is often difficult for victims of violence and torture. Indeed, the societal fabric that surrounded the participating victims ever since the crimes occurred has been based on denial of the suffering. Such situations can produce effects of dimming or even estrangement from a victim's own feelings.³⁰ For that reason, an expert assessment will complement the available witness statements in uncovering the full extent of the harm suffered by the victims.

Proposed experts to carry out the medical assessments of the direct victims

23. A medical evaluation for legal purposes should be conducted with objectivity and impartiality. The evaluation should be based on the physician's clinical expertise and professional experience.³¹ Victims' Counsel has two proposals as to identifying qualified experts to carry out the Victims' examination in an appropriate and safe manner.

²⁸ Transcript of 21 September 2021, p. 529, lines 19-24.

²⁹ L Ellison, VE Munro, 'Taking trauma seriously: Critical reflections on the criminal justice process' *The International Journal of Evidence & Proof*, 2017, 21(3), 183, 186.

³⁰ A Gautier, A Sabatini Scalmati (eds) *Bearing Witness, Psychoanalytical Work with People Traumatized by Torture and State Violence* (Abingdon: Routledge, 2018), 4.

³¹ UN Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), 9 August 199, para. 162.

24. The Panel may appoint the Netherlands Institute for Human Rights and Medical Examination ('Instituut voor Mensenrechten en Medisch Onderzoek', iMMO). iMMO is a Dutch Foundation specializing in the assessment of suspected victims of torture and inhumane treatment.³² It is an independent institution that has specialised in the medical assessment of suspected victims of torture and inhumane treatment and thus has a significant and relevant experience and expertise in this field. iMMO conducts their assessments on the basis of the UN Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).³³ The Istanbul Protocol outlines international legal standards and sets out international guidelines for the assessment of alleged victims of torture and ill treatment.³⁴

25. In the alternative, the [REDACTED], would be available to identify suitable independent experts [REDACTED]. [REDACTED] works closely with [REDACTED]. It was established [REDACTED]. They have extensive experience, are internationally recognized as a leading organisation, and have an [REDACTED]. However, [REDACTED]. [REDACTED] has indicated their availability to assist in [REDACTED].

26. Both options have important merit. Victims' Counsel provides the Trial Panel with a proposed preference to iMMO to carry out the assessments in these proceedings. Some victims have indicated their reluctance to engage with organisations [REDACTED]. Furthermore, iMMO has already indicated their willingness to

³² iMMO, Goal and Mission <<https://www.stichtingimmo.nl/about-immo/goal-and-mission/?lang=en>> last accessed 6 January 2022.

³³ UN Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), 9 August 1999.

³⁴ iMMO, Professional Statute <<https://www.stichtingimmo.nl/wp-content/uploads/2020/03/Professioneel-Statuut.pdf>> last accessed 6 January 2022.

conduct the assessment of the Victims in these proceedings, which may better contribute to expeditious conduct of the current proceedings.

Presumable timeframe for the assessments

27. It is currently difficult to indicate the exact amount of time that should be reserved for medical forensic examination of the three individual victims to be conducted and concluded.

28. By way of tentative estimate, Victims' Counsel informs the Panel that it may take the proposed experts around four weeks to present their report. iMMO has indicated that it will need: one week to make necessary arrangements and conduct the assessments of three victims; approximately two weeks are needed to write three reports and to have these critically read by a second reader in accordance with the framework of professional contradiction. Subsequently, these reports need to be translated.

29. Victims' Counsel would further like to point out that it is important to have a consultation with the appointed expert about the assessment question and planning of the assessments in due time before the actual start of the assessments.

V. REQUEST TO AUTHORISE A VICTIM TO DIRECTLY ADDRESS THE PANEL

30. Victim 05/05 is [REDACTED]. [REDACTED].³⁵ This evidence provides information on his observations [REDACTED]. He will present views and concerns beyond the evidence that the Trial Panel has been presented with by the SPO.

³⁵ [REDACTED].

IV. RELIEF

31. Victims' Counsel requests that:

- a. the Trial Panel appoints an expert to medically assess three direct Victims' (Victims 08/05, 09/05, 10/05) physical and psychological damage and injuries suffered because of torture, cruel treatment and arbitrary detention; and
- b. the Trial Panel authorises Victim 05/05 to directly address the Panel in order to present his views and concerns.

Word count: 3174



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24 January 2022

At The Hague, the Netherlands